"It is my view that the Labor Board's decision, here under review, is not supported by substantial evidence when the record is considered as a whole in the manner described and prescribed by *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474 (1951)" (A34).

This dispute over the substantiality of the evidence supporting the Board's decision—the sole issue raised by the Company in the court below—surely does not warrant resolution by this Court, Indeed, the Company does not even mention this issue in its petition for certiorari. Realizing that the only question which it presented to the court below is not worthy of review by this Court, the Company attempts to propound entirely different questions to this Court. This, of course, it may not do.

Moreover, wholly apart from this defect, the Company's "questions presented" do not warrant consideration by this Court. As we now show, neither the Board nor the court below made the broad legal pronouncements which the Company seeks to challenge here. On the contrary, their decisions are consistent with, and dictated by, prior decisions of this Court.

1. The first legal issue which the Company asks this Court to decide is whether the Board (or reviewing court) can "[sit] in judgment upon the substantive terms of the collective bargaining agreement" (Pet. 9). However, neither the Board nor the court below "sat in judgment" upon the terms of the agreement. Neither declared that a checkoff clause is an indispensable part of a collective bargaining agreement, or that an employer's failure to grant it is itself a violation of the Act. Rather, each held, on the basis of evidence in the record apart from the refusal itself, that the Company *in fact* had no objection to check-off and was resisting it for the sole purpose of avoiding agreement. Both relied on the Company's undisputed admissions: (1) that it had not refused the clause because of inconvenience to the Company (indeed that there was no inconvenience and

that the Company checked off for purposes other than union dues) (J.A. 28; A 28-29); (2) that it had not refused the clause as a matter of policy (indeed, that it granted the checkoff at other plants) (J.A. 32; A 28); and (3) that its sole reason for refusing the checkoff was that it did not want to "aid and comfort the union" (J.A. 31, 34, 35; A-29-30). As stated by the Company's attorney, "our refusal to grant the checkoff clause has been harassment of the International Union." (J.A. 11).

The decisions of the Board and of the court below are consistent with, and required by, this Court's decision in *NLRB* v. *Insurance Agents,* 361 U.S. 477, 485 (1960):

> "The first annual report of the Board declared: 'Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground . . . The Board has repeatedly asserted that good faith in the part of the employer is an essential ingredient of collective bargaining.' This standard had early judicial approval, e.g., *Labor Board* v. *Griswold Mfg. Co.,* 106 F.2d 713. Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB* v. *Insurance Agents,* 361 U.S. 477 (1960).

Clearly, as the Board and the court below held, an employer whose sole motivation for resisting a union demand is his unwillingness to give "aid and comfort to the union" does not have "a desire to reach ultimate agreement, to enter into a collective bargaining contract."

This is the complete antithesis of good faith bargaining. A desire to harass the union or to avoid giving aid and com-

fort to the union is not a lawful reason for refusing to agree to a dues checkoff, or any other union demand. The principal business of a union, after all, is to negotiate collective bargaining agreements, and to improve the wages, hours and working conditions of the employees which it represents. And every agreement or concession which an employer makes in collective bargaining gives aid and comfort to the union with which the employer deals. If the attitude of the Company in this case were proper, therefore, it would follow that any employer could lawfully come to the bargaining table and say: "We are willing to talk about anything, but we will not agree to any proposal you make, because we know that anything we agree to will give aid and comfort to your union." Plainly, this is not bargaining, and most certainly it is not good faith.

An employer may refuse to agree to any union proposal on the ground that it will reduce his profits, increase his costs, injure his competitive standing, interfere with the efficiency of his operations, or otherwise conflict with his legitimate business interests. It is not good-faith bargaining, however, to accept or reject a union proposal on the basis of whether it will help or hurt the union. Thus an employer may not, as the Company admittedly did here, refuse to agree to a union dues checkoff solely because it would give aid and comfort to the union.

The Company's contention that the decision below conflicts with *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952), is misplaced. In *American National Insurance*, this Court struck down a Board doctrine that the refusal of certain inherently desirable contract provisions is *per se* a violation of the Act without regard to the motive or behavior of the party. Here, neither the Board nor the court below premised the finding of bad faith on the refusal of the checkoff clause as such. Rather, they found from other evidence, including the Company's own admissions, that its sole purpose in refusing the demand was to prevent

agreement. It was not the refusal of the clause, but the desire to prevent agreement, which the Board and the court below held violative of Section 8(a)(5).

Likewise, the Company's contention that the court below "asserted seven grounds" constituting bad faith bargaining (Pet. pp. 10-11) miscomprehends the opinion below. The court below held only that the Board's finding of subjective bad faith—a desire to prevent agreement—was supported by substantial evidence. The seven items were enumerated as evidentiary factors supporting this single finding of unlawful motivation.

2. The other "question presented" by the Company in challenging the finding of violation is whether its bad faith bargaining is excused by the alleged bad faith of the Union in taking an "adamant position throughout the negotiations that it would never sign a contract without a dues checkoff provision." (Pet. p. 20). This is surely one of the reddest herrings ever dragged before this Court.

In the first place, the contention is based on an erroneous factual premise. The Union did offer to sign a contract without a checkoff provision; indeed, it offered several alternatives to a checkoff clause, each of which was rejected by the Company. Both the Union and Company negotiators so testified (J.A. 17, 27-28), and both the Board and the court below so found (J.A. 47; A 33, n. 18).

In the second place, even if the Union *had* told the Company that it could not sign an agreement without a checkoff clause, it would not thereby have been bargaining in bad faith. As the record shows, the Union was faced with a financial problem in its efforts to represent employees at this plant. Its nearest office was 85 miles away (J.A. 17); the employees were scattered over a 35-40 mile radius (J.A. 17-18); and absent some means of dues collection at the plant it would be difficult, if not impossible, for the Union to have secured the revenue necessary to provide services to the employees. Even if these considerations *had* motivated the

Union to resist obligating itself to an agreement which did not provide a means for dues collection, there would have been no violation of the Act. The Company has overlooked the essential difference between such a "fixed position," had it been taken by the Union, and the "fixed position" taken by the Company. The Union's position would have been based on legitimate factors (and therefore taken in good faith) whereas the Company's position was admittedly based solely on a desire to avoid giving "aid and comfort to the Union" (and therefore was taken in bad faith). It is not the rigidity of the position, but the motivation therefor, that determines whether a party is negotiating in bad faith. *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952). It should be noted, in conclusion, that the Company has never filed a charge alleging that the Union's position on the checkoff constituted bad faith bargaining.

B. Question Involving the Remedy Prescribed for the Violation (Question Presented No. 2).

In affirming the Board's order that the Company bargain in good faith, the court below expressed its judgment that continued refusal to grant the Union's request for a checkoff clause would constitute contempt of that order. The Company challenges this expression as "indirectly compelling" it to agree to a checkoff clause, and claims that such compulsion is in violation of Section 8(d)'s provision that the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."

Before discussing the substance of this challenge, we feel constrained to raise a question concerning this Court's jurisdiction over the issue. There were two separate petitions for review filed in the court below, which were consolidated for hearing. The Company's petition (No. 19,507) challenged the Board's finding of a violation, but did not seek any change in the terms of the Board's order in the event the finding of violation were upheld. The Union's petition (No. 19,492) challenged the Board's order as inadequate, and

sought an order specifically requiring the Company to withdraw its resistance to the Union's checkoff demands. It was in response to the Union's petition (i.e. in case No. 19,492) that the court below made the comments challenged by the Company in its second "question presented." But the Company was not a party in No. 19,492. It did not intervene therein, and, although its case was consolidated with that case, such consolidation does not, under the rules of the court below, constitute the parties in one case parties to the other. Since the Company was not a party in No. 19,492, it is not entitled to petition for review of the lower court's action on that case. 28 U.S.C. § 1254(1); *United Automobile Workers* v. *Scofield*, 382 U.S. 203, 208-09 (1965).

Even if this Court had jurisdiction over the second "question presented," it would not be worthy of review. The Company does not challenge the terms of the Board's order as it was enforced, but only the prospective interpretation of the order contained in the court's opinion. Apparently, the Company wishes this Court to grant certiorari and, without in any way altering the terms of the Board's order, simply express disagreement with the court below as to the meaning of those terms. This seems a rather extraordinary basis for requesting this Court's attention.

In any event, there is no merit to the Company's criticism of the lower court's interpretation of the order. It must be remembered that the negotiations have been in progress for several years, and during that entire period the Company has never advanced any objection to the Union's checkoff demand except its unwillingness to aid and comfort the Union. Indeed, at the hearing, it admitted that it has no other objection. The Board and the court below have now held that its one ground for resisting the clause is an illicit ground. At this point, there clearly are only two possible alternatives available to the Company: it must either agree to the demand or manufacture new reasons for objecting to it. The court below warned that the manufacture of new grounds for resistance would be contemptuous (A32-33,

n. 16). This warning was an appropriate application of the principle enunciated in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956), that "good faith bargaining necessarily requires that claims made by either bargainer be honest claims." Manifestly, any new ground for resistance advanced by the Company, after its disclaimer that there are any others, and the failure to advance any others for five years, could not be an "honest claim."

It follows that the Company, having no "honest claim" for resisting the Union's checkoff demand, must withdraw that resistance. This is simply an application of the principle, set forth in Section 8(d), that the duty to bargain requires a party to incorporate in a written agreement "any agreement reached if requested by either party."[4] Nor does this requirement conflict with Section 8(d)'s other provision that the duty to bargain "does not compel either party to agree to a proposal or required the making of a concession." The latter clause does not mean that an employer can say with impunity: "I have no objection to any of your proposals, but I nonetheless refuse to agree to any of them." Such a construction would render Section 8(a)(5) a dead letter, and would conflict with this Court's injunction that good faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining agreement." *NLRB* v. *Insurance Agents*, 361 U.S. 477, 485

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[4] The Company, in printing Section 8(d) in the "Statutes Involved" portion of its petition (Pet. p. 3) has carefully excised this phrase. For the convenience of the Court, we here quote the provision without excision, italicizing the portion omitted by the Company:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, *or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party,* but such obligation does not compel either part to agree to a proposal or require the making of a concession . . ."

(1960). The employer who has no objection to a Union proposal makes no "concession" when he incorporates that proposal into a collective bargaining agreement.

As the court below noted (A 32), in agreement with the Fifth Circuit, *NLRB* v. *Herman Sausage Co.*, 275 F.2d 229, 231 (1960), refusal to make concessions cannot be used "as a cloak . . . to conceal a purposeful strategy to make bargaining futile or fail." Rather, this provision of Section 8(d) means only that an employer need not yield "positions fairly maintained." *Herman Sausage Co., supra,* 275 F.2d at 231. It was enacted to prevent the Board from insisting that an employer abandon a position maintained in *good faith* merely because, in the Board's view, the position is "unreasonable, or unfair, or impractical, or unsound" (*Id.* at p. 231). Where, however, an employer has no objection to a union proposal, or has only an *unlawful* objection, this provision of Section 8(d) is inapplicable, anl the preceding provision requiring incorporation of undisputed issues in a written agreement governs.

It follows that the lower court's interpretation of its decree—which does not conflict with a decision of any other court—is correct. Even if this Court has jurisdiction of this issue, therefore, there is no reason for review.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be denied.

Respectfully submitted,

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